

BEFORE THE SECRETARY OF STATE

STATE OF COLORADO

CASE NO. OS 2008-0008

AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY BRADLEY RICHARDS
REGARDING ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY
NOT ANOTHER TAX INCREASE.**

On April 11, 2008, Complainant Bradley Richards (Richards) filed a complaint with the Colorado Secretary of State alleging violations of the Fair Campaign Practices Act, Sections 1-45-101 *et seq.*, C.R.S. (2007) (FCPA). Kathy Ann Tourney (Tourney) was originally named as the Respondent in this action. As reflected below, the Complaint was amended to reflect the issue committee, Not Another Tax Increase (NATI), as the Respondent. The Secretary of State transmitted the complaint to the Colorado Office of Administrative Courts on April 15, 2008, for the purpose of conducting a hearing pursuant to Article XXVIII, Section 9(2)(a) of the Colorado Constitution.

Hearing was held in this matter on June 2, 2008. The hearing was digitally recorded in Courtroom 1. Richards participated personally and represented himself. Tourney and NATI were represented by John S. Zakem, Esq., Zakem Atherton, LLC. The Administrative Law Judge (ALJ) issues this Agency Decision pursuant to Colo. Const. Art. XXVIII, Section 9(2)(a) and Section 24-4-105(14)(a), C.R.S. (2007).

PRELIMINARY MATTERS

Two motions were pending at the commencement of the hearing: Tourney's Motion to Dismiss and Complainant's Motion to Amend Complaint. In addition, at the outset of the hearing, Tourney moved for attorney fees pursuant to Section 1-45-111.5, C.R.S. At hearing, the ALJ granted the Motion to Dismiss and Motion to Amend Complaint and now denies the motion for attorney fees.

Motion to Dismiss. As referenced above, the caption in this matter originally named Tourney as the Respondent. On May 22, 2008, Tourney moved to dismiss asserting that Complainant had failed to state a claim upon which relief could be granted against Tourney either in her individual capacity or her representative capacity as registered agent for NATI. At a status conference held on May 23, 2008, the ALJ determined that the Motion to Dismiss would be heard at the beginning of the hearing

on the merits scheduled for June 2, 2008. While this motion was pending, Richards filed a Motion to Amend Complaint in which he sought to change the Respondent in this matter from Tourney to NATI and to make other changes in the Points of Law section of the complaint. By this requested amendment, Richards was no longer seeking any relief against Tourney but was only seeking relief against the issue committee NATI.

At the June 2 hearing on the motion to dismiss, Richards conceded the motion. The ALJ granted Respondent Tourney's motion to dismiss and dismissed Tourney as a Respondent in this matter.

Motion to Amend Complaint. After the Motion to Dismiss was granted, Mr. Zakhem, who had originally entered an appearance only on behalf of Tourney, entered his appearance on behalf of NATI. The ALJ heard argument on Complaint's Motion to Amend Complaint, filed May 29, 2008. Complainant clarified that he is not relying on the entire Article XXVIII or FCPA in the Points of Law section. NATI did not object to the motion to amend, so long as it would have the opportunity to present additional testimony, if necessary and requested, in relation to Section 1-45-111.5(1) of the FCPA. No such request or request to submit post-hearing briefs was made.

The initial complaint in this matter contained language that could be interpreted to name NATI as a Respondent. Clarification of the identity of the Respondent was essential in order to proceed in an orderly fashion. In the interests of justice and in the absence of any objection, the ALJ therefore granted the Motion to Amend Complaint. The Amended Complaint thereafter governed this proceeding. Both parties also indicated that they were prepared to proceed to hearing.

Motion for Attorney Fees. At hearing, Tourney moved for attorney fees pursuant to Section 1-45-111.5(2), C.R.S., asserting that Richards' refusal to dismiss his action against Tourney, in light of his Motion to Amend Complaint, amounted to an action lacking substantial justification and one interposed for harassment. Lacking substantial justification is defined in Section 1-45-111.5(2) as substantially frivolous, substantially groundless or substantially vexatious.

A frivolous claim is one that lacks any rational basis in evidence or law. A groundless claim is one that is not supported by any credible evidence at trial. *W. United Realty, Inc. v. Isaacs*, 679 P.2d 1063 (Color. 1984). The standards for "substantially frivolous" or "substantially groundless" are no more demanding than those for "groundless" or "frivolous." *In re Application of Talco, Ltd.*, 769 P.2d 468 (Colo. 1989). A vexatious claim is brought in bad faith to annoy or harass a party. *Bockar v. Patterson*, 899 P.2d 233 (Colo. App. 1994). *Pro se* litigants enjoy special protections pursuant to Section 13-17-102 (6), C.R.S., unless they knew or reasonably should have known that their claims lacked substantial justification. *Artes-Roy v. Lyman*, 833 P.2d 62 (Colo. App. 1992).

Tourney contends that in order to avoid the imposition of attorney fees, Richards was obliged to dismiss his complaint against her in advance of the June 2, 2008, hearing on the motion to dismiss. She therefore claims attorney fees incurred in preparation for the June 2 hearing. On May 29, 2008, Tourney's counsel alerted Richards to Tourney's position that Richards' Motion to Amend in essence conceded the Motion to Dismiss, requested that Richards sign a Stipulation for Dismissal, and informed him that Tourney would seek attorney fees pursuant to Section 13-17-102, C.R.S., if he failed to do so.

In considering Tourney's motion, the ALJ has considered and is guided by Section 13-17-102(5) and (6), C.R.S. Subsection (5) provides that no attorney fees shall be assessed if a voluntary dismissal is filed as to any claim within a reasonable time after the party filing the dismissal knew or reasonably should have known that he would not prevail on the claim or action. Subsection (6) addresses *pro se* parties such as Richards. It provides that no attorney fees shall be assessed a *pro se* party "unless the court finds that the party clearly knew or reasonably should have known that his action or defense, or any part thereof, was substantially frivolous, substantially groundless, or substantially vexatious. . . ."

Here, Richards clarified at the status conference held on May 23, 2008, that he was not seeking relief against Tourney in her individual capacity. The original complaint could be read to seek some relief against NATI. Complainant took action through his Motion to Amend Complaint to clarify the intended respondent. He conceded the Motion to Dismiss at the hearing scheduled to consider the motion. He therefore acted within a reasonable time to effectuate the dismissal of Tourney as a respondent in this matter. Further, under these circumstances, Complainant did not clearly know or reasonably should have known that his action against Tourney was substantially frivolous, substantially groundless or substantially vexatious.

The ALJ therefore denies Tourney's motion for attorney fees.

ISSUES PRESENTED

The first issue is whether the NATI violated Section 1-45-108(3) of the FCPA by making contributions before it registered as an issue committee on March 20, 2008. The alleged contributions are in relation to the establishment of a website. The second issue is whether NATI violated Rule 2.6 of the Secretary of State's Rules Concerning Campaign and Political Finance, 8 CCR 1505-6, based on Colo. Const. Article XXVIII, Section 2(10), by contributing to candidate committees. At issue are postcards endorsing candidates and automated telephone calls urging voters to vote for candidates.

FINDINGS OF FACT

1. NATI is an issue committee formed to oppose certain ballot issues that appeared on the ballot on May 6, 2008. Ballot Issue A was denominated a mill levy increase, and Ballot Issue B was denominated a Removal of the TABOR cap on tax increases. Kathy Ann Tourney (Tourney) is the registered agent for NATI. Tourney was also a candidate for the Ken Caryl Ranch Metropolitan District (KCRMD) Board. The election for KCRMD Board members occurred on May 6, 2008. Tourney maintained a candidate committee.

2. Tourney reserved the domain name for the website for NATI on February 28, 2008. She was able to reserve the name at no charge for thirty days. She then contacted a website designer and arranged for a website for NATI. On April 2 or 3, 2008, Tourney paid the website designer Nyx-Calliopea Production Company \$457.69 from her personal funds for services rendered, including domain name and hosting, initial setup and posting, and content updates. The client listed on the invoice was NATI. This was the first payment established by the record in relation to the website. Tourney considered this \$457.69 to be a contribution to NATI, although it was listed by NATI as an expenditure on forms filed with the Secretary of State. Based on the record as a whole, the ALJ finds that Tourney personally established the website for NATI using her own funds on April 2 or 3, 2008.

3. This website was live as of at least March 3, 2008. The record does not indicate that the website as of March 3 reflected who sponsored it at that point in time. The website urged votes to vote “no” on Ballot Issues A and B.

4. As registered agent, Tourney registered NATI on March 20, 2008. The first expenditure by NATI was on April 2, 2008.

5. NATI paid WizBang Solutions, Inc., \$578.06 for the costs of printing oversized postcards. These postcards urged voters to vote “no” on Ballot Issues A and B. The postcards also contained the following language: “The Not Another Tax Increase campaign **endorses the KCRMD board candidates:** Wayne Lyle, Kathy Tourney, and Jeff Esbenshade.” [Emphasis in the original.]

6. NATI paid \$1,011.81 for automated, recorded telephone calls to be made to the most likely voters in the May 6, 2008 election. These telephone calls were recorded by Tourney, Jim Wilson and Dan Sallis. The calls were placed to voters in the period from approximately April 12 to 16, 2008. In her recording, Tourney urged voters to vote “no” on Ballot Issues A and B and also urged them to vote for Wayne Lyle, herself and Jeff Esbenshade for the KCRMD Board. The recordings of Wilson and Sallis also contained the same message, including urging voters to vote for Tourney, Wayne Lyle and Jeff Esbenshade for the KCRMD Board.

7. Tourney's recorded telephone call was the first one used. After the Tourney recorded call was disseminated, Tourney received feedback that NATI should not expend funds to endorse candidates. She directed Wilson and Sallis not to endorse candidates in their recorded telephone calls.

8. The reasonable inference from the record is that Wayne Lyle and Jeff Esbenshade maintained candidate committees.

DISCUSSION

Article XXVIII of the Colorado Constitution was adopted as an initiated measure by the voters of Colorado in 2002. The FCPA contains other provisions of Colorado's campaign finance law. In addition, the Secretary of State has adopted rules to implement these provisions. 8 CCR 1505-6. Richards contends that NATI violated Colorado's campaign finance law in two respects. First, he asserts that NATI violated Section 1-45-108(3), C.R.S., by accepting or making contributions before it registered on March 20, 2008. Second, Richards originally contended that NATI violated the definition of an issue committee contained in Colo. Const., Article XXVIII, Section 2(10), by endorsing Wayne Lyle, Kathy Tourney, and Jeff Esbenshade as candidates for the KCRMD Board. At hearing, this second asserted violation was conceded to be a violation of Rule 2.6 of the Secretary of State's Rules Concerning Campaign and Political Finance, 8 CCR 1505-6, effectively amending this asserted violation.

In accordance with Section 9(1)(f) and 9(2)(a) of Article XXVIII of the Colorado Constitution, this proceeding is conducted pursuant to the provisions of Section 24-4-105, C.R.S. of the State Administrative Procedure Act (APA). In such a proceeding, the proponent of the order bears the burden of proof. Section 24-4-105(7), C.R.S. In this case, Richards is the complaining party and therefore bears the burden of proof to establish a violation of Colorado's campaign finance law.

Alleged Violation of Section 1-45-108(3). Section 1-45-108(3) requires, *inter alia*, that all issue committees "shall register with the appropriate officer before accepting or making any contributions." The ALJ dismissed this claim on a motion by NATI at the close of Richards' case. A contribution is defined by Section 1-45-103(6)(c)(II) to include "any payment made to a third party on behalf of and with the knowledge of the political organization." Richards claims that the \$457.69 payment made to Nyx-Calliopea Production Company was in fact a payment made by the issue committee NATI. Richards relies on the definition of "expenditure" in Colo. Const. Art. XXVIII, Section (8)(a). He contends that NATI expended funds when the website went live by March 3, 2008, in advance of the registration date, because there was a contractual agreement requiring spending in the amount of \$457.69. The statutory prohibition of Section 1-45-108(3), however, uses the term "contributions," not "expenditures." The definition of expenditures is therefore not applicable.

Here, the payment made for website expenditures was made by Tourney from personal funds, not NATI funds. Even if this were deemed a contribution, it was made by Tourney on April 2 or 3, *after* the date of registration of the issue committee NATI on March 20, 2008. Section 1-45-108(3) only prohibits issue committees from accepting or making contributions *before* registering. Richards therefore failed to establish a violation of Section 1-45-108(3) of the FCPA, and the ALJ determines that no violation of Section 1-45-108(3) has been proven.

Violation of Rule 2.6. In his original complaint, Richards contended that NATI violated the definition of an issue committee contained in Colo. Const. Article XXVIII, Section 2(10), by endorsing Wayne Lyle, Kathy Tourney, and Jeff Esbenshade as candidates for the KCRMD board. In relation to this charge, at hearing NATI conceded two violations of Rule 2.6 of the Secretary of State's Rules Concerning Campaign and Political Finance, 8 CCR 1505-6. Richards agreed with these conceded violations, and the complaint was thereby effectively amended to reflect Rule 2.6 as the asserted basis for these violations. Section 1-45-111.5(1.5), C.R.S., approved April 10, 2008, gives the ALJ jurisdiction to consider violations of the Secretary of State Rules Concerning Campaign and Political Finance.

Rule 2.6 provides in relevant part as follows:

Issue committees shall not contribute to political parties, political committees or candidate committees. . . . [Article XXVIII, Section 2(10)(b)]

The first violation asserted and conceded by NATI was NATI's payment of \$578.06 to a third party for postcards, described in Finding of Fact #5. These postcards endorsed KCRMD Board candidates Wayne Lyle, Kathy Tourney, and Jeff Esbenshade and therefore constituted a contribution for the benefit of the candidate committees of these candidates. Art. XXVIII, Section 2(5)(a)(II) ["Contribution" includes payment made to a third party for the benefit of a candidate committee.]

The second violation asserted and conceded by NATI was NATI's payment of \$1,011.81 for the automated telephone calls to voters, as described in Finding of Fact #6. The content of these calls urged voters to vote for KCRMD Board candidates Wayne Lyle, Kathy Tourney, and Jeff Esbenshade. This payment therefore constituted a contribution for the benefit of the candidate committees of these candidates. Art. XXVIII Section 2(5)(a)(II)

Penalty. Colo. Const. Art. XXVIII, Section 9(2)(a), provides that if the ALJ determines that a violation has occurred, the ALJ's decision shall include any "appropriate order, sanction, or relief authorized by this article." Richards seeks a penalty pursuant to Colo. Const. Art. XXVIII, Section 10, and NATI concedes the applicability of this section. Section 1-45-111.5(1.5)(b), C.R.S., provides that any person who violates the Secretary of State Rules Concerning Campaign and Political

Finance shall be subject to any of the sanctions specified in Section 10. Section 10 provides for the imposition of civil penalties.

In this matter, in relation to the violation regarding the payment by NATI for postcards, Richards seeks a penalty of \$578.06. NATI stipulated to this penalty. In relation to the violation regarding the payment by NATI for automated telephone calls, Richards seeks a penalty of \$325.32, representing the amount he believes is attributable to the telephone calls recorded by Tourney. NATI also stipulated to this penalty. The total civil penalty sought is therefore \$903.38.

The ALJ finds this penalty to be reasonable and imposes a fine against NATI of \$903.38. This amount reflects that agreed to by the parties. Further, while considerations of deterrence require imposition of a fine, there was no evidence in aggravation presented. In fact, when Tourney learned that the content of the automated calls endorsing candidates was inappropriate, she directed others not to record similar messages.

CONCLUSIONS OF LAW

1. The ALJ has jurisdiction over this matter. Colo. Const. Art. XXVIII, Section (9)(2)(a), Section 1-45-111.5(1.5), C.R.S. (2008).

2. Colo. Const. Art. XXVIII, Section (9)(1)(f) provides that the hearing in this matter is to be conducted in accordance with Section 24-4-105 of the APA. Under the APA, the proponent of an order has the burden of proof. Section 24-4-105(7), C.R.S. In this instance, Richards is the proponent of an order seeking a determination that NATI committed a violation of Section 1-45-108(c) and of Rule 2.6, 8 CCR 1505-6.

3. The evidence failed to show that NATI committed a violation of Section 1-45-108(c) of the FCPA. That portion of the complaint alleging a violation of Section 1-45-108(c) of the FCPA is dismissed.

4. NATI, an issue committee, violated Rule 2.6, 8 CCR 1505-6, in that it contributed to candidate committees.

AGENCY DECISION

It is therefore the Agency Decision that NATI be fined \$903.38 for the violations of Rule 2.6, 8 CCR 1505-6, as set forth above. This penalty shall be paid in accordance with the rules of the Secretary of State. This decision is final and subject to review by

the Court of Appeals, pursuant to Section 24-4-106(11), C.R.S., and the Colo. Const. Art XXVIII, Section 9(2)(a).

DONE AND SIGNED

June 16, 2008

NANCY CONNICK
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above **AGENCY DECISION** was served by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado addressed to:

John S. Zakhem, Esq.
Zakhem Atherton, LLC
700 17th St. Suite 2000
Denver, CO 80202

Bradley Richards
32 Willowleaf Drive
Littleton, CO 80127

and to:

William A. Hobbs
Deputy Secretary of State
Department of State
1700 Broadway, Suite 200
Denver, CO 80290

on this ____ day of _____.

Technician IV